

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

GENERAL COUNSEL
OF COPYRIGHT

JAN 16 1998

RECEIVED

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In the Matter of :
:
Mechanical and Digital :
Phonorecord Delivery Rate :
Adjustment Proceeding :
:
- - - - - x

Docket No. 96-4 CARP DPRA

ORIGINAL

MOTION TO FILE LATE A
NOTICE OF INTENT TO PARTICIPATE

Broadcast Music, Inc. ("BMI") hereby requests that the Copyright Office (the "Office") accept late its notice of intent to participate in the above-captioned proceeding. On December 29, 1997, BMI filed comments on the proposed rate filed by the National Music Publishers' Association ("NMPA"), the Recording Industry Association of America ("RIAA") and The Songwriters Guild of America ("SGA") in accordance with the Office's order dated November 18, 1997. 62 Fed. Reg. 63506 (1997). BMI did not file a Notice of Intent to Participate because the Office stated that it would adopt the agreed upon rates (assuming the rates were unopposed) and because BMI supported the proposed rates.

On December 19, 1997, two organizations -- the United States Telephone Association and the Coalition of Internet Webcasters -- filed Notices of Intent to Participate and comments on the proposed regulations. BMI believes that resolution of certain of the

comments may indirectly implicate the applicability of the public performing right in 17 U.S.C. § 106(4) to digital transmissions. BMI does not believe that empanelling a Copyright Arbitration Royalty Panel is necessary to resolve the issues raised by the commentators because these issues are legal issues and are outside the scope of this proceeding. However, in the event of a proceeding, BMI should be allowed to participate.

BMI represents the public performing right in approximately three million musical works. Accordingly, BMI's participation is necessary.

Because BMI filed its comments on the proposed rate within the appropriate time-period, no party to the proceeding could be prejudiced by BMI's participation in the proceeding, especially since the parties filing opposition comments have not previously participated in negotiating these rates.

The Office has previously accepted a late-filed notice of intent to participate (over one year late) where such acceptance would not prejudice the other parties to the proceeding. See Order, In the Matter of Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6 CARP NCBRA at 3-4 (July 30, 1997). Therefore, BMI respectfully requests that the Office accept the attached notice of intent to participate in the above-captioned proceeding.

Respectfully submitted,

BROADCAST MUSIC, INC.

Marvin L. Berenson/mjr

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Michael J. Remington

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Suite 900
901 15th Street, NW
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January 16, 1998

CERTIFICATE OF SERVICE

I, Cynthia A. Queen, hereby certify that on this 16th day of January, 1998, a copy of the foregoing "Motion to File Late a Notice of Intent to Participate" was served by Overnight Express mail, on the following parties:

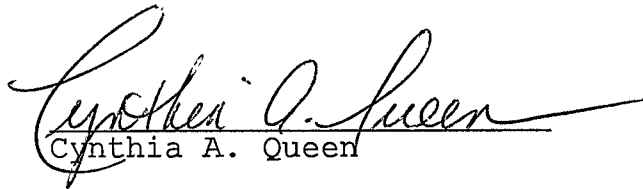
Cary Sherman
Recording Industry Association
of America
1020 19th Street, NW
Suite 200
Washington, DC 20036

Bruce G. Joseph
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Carey R. Ramos
Paul, Weiss, Rifkind, Wharton
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McDermott, Will & Emery
600 Thirteenth Street, NW
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Washington, DC 20002


Cynthia A. Queen

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NOTICE OF INTENT TO PARTICIPATE

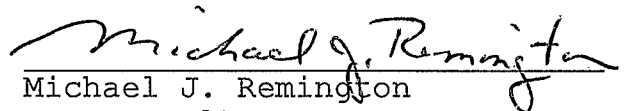
Broadcast Music, Inc. ("BMI") hereby files its notice of
intent to participate in the above-captioned proceeding.

Respectfully submitted,

BROADCAST MUSIC, INC.



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DEC 29 1997

Before the
UNITED STATES COPYRIGHT OFFICE
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In the Matter of:

Mechanical and Digital
Phonorecord Delivery
Rate Adjustment Proceeding

Docket No. 96-4 CARP DPRA

COMMENTS OF BROADCAST MUSIC, INC.

On December 1, 1997, the Copyright Office (the "Office") issued a notice of proposed rulemaking in the above-captioned proceeding (the "Notice"). The Office stated that it would adopt the rates, and regulations implementing these rates, proposed in a joint petition submitted by the Recording Industry Association of America, the National Music Publishers' Association, Inc. ("NMPA") and the Songwriters Guild of America (the "Joint Petition") if no comments or Notices of Intent to Participate are received by the close of business on December 29, 1997. In accordance with the Notice, Broadcast Music, Inc. ("BMI") hereby files its comments on the proposed rates and regulations.¹

BMI is a music performing rights licensing organization that represents the public performing rights in a repertoire of over 3 million musical works owned or controlled by approximately 200,000 affiliated songwriters, composers and publishers, including the works of thousands of foreign societies that

¹ Because BMI does not challenge the proposed rates, a Notice of Intent to Participate is not necessary and therefore is not herein filed.

license their works through BMI in the United States. Many of the publishers represented by BMI are members of the NMPA, and are therefore represented in this proceeding with regard to the mechanical compulsory license rate. However, the public performing rights of BMI's songwriters, composers and music publishers have not been represented in this proceeding. BMI's comments are intended to support and protect the public performing rights of its affiliates.

As the Notice indicates, this proceeding involves the first time rates have ever been set for digital phonorecord deliveries in accordance with the provisions of Section 115 of the Copyright Act of 1976, as amended by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (the "DPRA"). In clear and express language, the DPRA provides that digital transmissions of musical works, which qualify for the Section 115 compulsory license because they meet the definition of "digital phonorecord delivery," may also constitute public performances under the terms of Section 106(4) of the Copyright Act:

A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

Codified at 17 U.S.C. § 115(d).²

² The legislative history of the DPRA is consistent with
(continued...)

In view of the overlapping nature of the rights involved in digital transmissions of copyrighted musical works on the Internet (and other components of the global and national information infrastructures), if the Office adopts the proposed rates and regulations set forth in the Joint Petition, the Office should also clarify that the Section 115 compulsory license does not apply to any rights of public performance that may exist in the digital transmissions subject to the compulsory license.

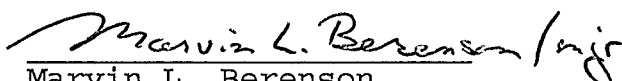
Although the courts have not yet expressly delineated the precise scope of the overlapping rights, BMI is nonetheless concerned that the public, and potentially the courts, may be misled by reading the Office's regulations regarding the compulsory mechanical license rates and terms for digital phonorecord deliveries if the regulations are not clear as to their inapplicability to the public performing right.

Accordingly, BMI respectfully requests that Part 255 of the regulations be clarified to state that nothing therein affects the public performance right under 17 U.S.C. § 106(4). Further, proposed Section 255.6(b) creates the concept of a "Transient Phonorecord" for which no royalty is due. This section may leave the misimpression that performances of music, via the Internet, or in other contexts where a transient copy is made to facilitate performances, require no copyright license. Finally, the rules

²(...continued)
the express statutory text. See H.R. Rep. 274, 104th Cong. 1st Sess., at 28 (1995) (stating that "[d]igital phonorecord delivery, as defined in § 115(d), may also constitute a public performance . . .").

make certain promotional activities and uses of only a portion of a sound recording exempt from the payment of a mechanical royalty. Again, a clarification should be made that such an exemption does not apply to the public performance that also occurs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Marvin L. Berenson /njr".

Marvin L. Berenson
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Assistant Vice President/
Legal and Regulatory Affairs
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December 29, 1997